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**BY ECF**

Hon. May Kay Vyskocil  
USDJ-SDNY  
Daniel P. Moynihan US Courthouse  
Room 18 C  
500 Pearl St.  
New York, NY 10007-1312

Re: *US v. Jorge Navarro, et al.*, S6 20 Cr. 160 (SDNY) (MKV)

Dear Judge Vyskocil:

Dr. Fishman contends a conscious avoidance instruction is unwarranted in this case on the grounds urged during today's charging conference.

As the Second Circuit recently reiterated, "A district court may provide a conscious avoidance jury instruction *only* if two requirements are satisfied: (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction *and* (2) *the appropriate factual predicate for the charge exists*, i.e. the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was (a) aware of a high probability of the fact in dispute *and* (b) *consciously avoided confirming that fact.*" *U.S. v. Wedd*, 993 F.3d 104, 118-19 (CA2 2021) (emphasis supplied) (cleaned up). Here, an appropriate factual predicate is lacking, minimally because the government points to nothing in the record suggesting that Dr. Fishman consciously avoided confirming – *viz.*, that he "t[ook] deliberate actions to avoid learning" – any relevant fact. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769-70 & n.9 (2011).

Respectfully,

  
Marc Fernich  
Maurice Sencarz

cc: All Counsel (ECF)